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Nos. 86-495, 86-624 and 86-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *et al.*, K MART CORPORATION and 47th STREET PHOTO, INC.,

Petitioners,

—v.—

COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS, CARTIER, INC. and CHARLES OF THE RITZ GROUP, LTD.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE UNITED STATES TRADEMARK ASSOCIATION

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The United States Trademark Association (hereinafter "USTA") submits this brief in support of the respondents, to urge affirmance of the opinion of the United States Court of Appeals for the District of Columbia Circuit. Consents have been granted by all parties and have been filed with the Clerk.

USTA is a not-for-profit corporation, whose members have a special interest in trademarks. They include the owners of trademarks both in this country and abroad, and lawyers, advertising agencies and other organizations knowledgeable about trademarks and having an interest in their protection. USTA's membership, which now exceeds 1800 members from 80 countries, crosses all industry lines and includes both manufacturers and retailers.[1] All share the goal of emphasizing the importance of trademarks and promoting an understanding of the essential role they play in fostering effective commerce and fair competition.

USTA was founded in 1878, in part to encourage the enactment of federal trademark legislation after this country's first trademark act was declared unconstitutional. Since that time, USTA has been instrumental in making recommendations and providing assistance to legislators in connection with each subsequent trademark act, or amendment thereof, including the current statute.

USTA serves both its members and the interests of the public by disseminating information about trademarks; by publishing books and articles about their function, protection, and proper use; by conducting seminars and other educational programs;

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1 Two of the named parties in this action, petitioner K Mart Corporation and respondent Charles of the Ritz Group, Ltd., are members of USTA as is Cartier International, Inc., which we understand is related to respondent Cartier, Inc. Several members of USTA are also members of the respondent Coalition, and the law firm representing the Coalition is a USTA member as well. The named parties and attorneys representing the named parties did not participate in USTA's decision to file this brief, in formulating the opinions expressed in the brief, nor in the writing of the brief.

by maintaining a library of trademark information; and by making speakers or instructors available to civic organizations and other groups requesting information about trademarks.

The membership of USTA represents a very significant and important segment of the United States business community and has substantial expertise in trademark law. It has participated in various courts as an amicus curiae in six cases which involved vital trademark issues.[2]

Although the cases involving gray market imports, including the present case, have principally involved interpretations of the Tariff Act, rather than the Federal Trademark Act, they are of great importance to owners of United States trademarks because of their significant impact on trademark rights. Accordingly, in the past five years, USTA has presented programs featuring this subject at two annual meetings and at three seminars. It has published articles in the Trademark Reporter entitled: *The Bell and Howell: Mamiya Case—Where Now Parallel Imports?*, 74 Trademark Rep. 1 (1984); *The History and Present Status of Gray Goods*, 75 Trademark Rep. 433 (1985); and *Restricting the Gray Market in Trademarked Goods: Per Se Legality*, 76 Trademark Rep. 363 (1986), and it has established a special committee to analyze and report on the problem.

There have been at least twenty cases brought since 1982 involving parallel imports. Some, including the present cases, have involved challenges to the validity of Customs Regulations that permit entry of certain goods although not authorized by the United States trademark owner, *e.g. Olympus Corp.* v. *United States*, 792 F.2d 315 (2d Cir. 1986), *petition for cert. filed*, Nov. 6, 1986 (No. 86-757); *Vivitar Corp.* v. *United States*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986). Others have involved private causes of action under the Tariff Act whereby trademark owners have sought to prevent the importation or sale of goods that were not automatically excluded under the Regulations, *e.g. Epocha Distrib-*

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2 For example, *Ralston Purina Co.* v. *On-Cor Frozen Foods, Inc.*, 746 F.2d 801 (Fed. Cir. 1984)

utors, Inc. v. *Quality King Distributors, Inc.*, No. 86 Civ. 2270 (E.D.N.Y. Jan. 21, 1987); *Osawa & Co.* v. *B & H Photo*, 589 F. Supp. 1163 (S.D.N.Y. 1984); *International Armament Corp.* v. *Matra Manurhin Int'l, Inc.*, 630 F. Supp. 741 (E.D. Va. 1986); *Premier Dental Products Co.* v. *Darby Dental Supply Co.*, 794 F.2d 850 (3d Cir.), *cert. denied*, 107 S. Ct. 436 (1986). Still others have included causes of action under the Federal Trademark Act alleging trademark infringement, *e.g.*, *NEC Electronics, Inc.* v. *Cal Circuit ABCO, Inc.*, 231 U.S.P.Q. 956 (C.D. Cal. 1986), *rev'd*, 810 F.2d 1506 (9th Cir. 1987); *Weil Ceramics & Glass, Inc.* v. *Dash*, 618 F. Supp. 700 (D.N.J. 1985), or alleging violation of 15 U.S.C. § 1124, *International Armament Corp.* v. *Matra Manurhin Int'l, Inc.*, 630 F. Supp. 741. Other actions, alleging unfair acts and unfair methods of competition, have been brought under § 337 of the Tariff Act, *In re Certain Alkaline Batteries*, 225 U.S.P.Q. 823 (Int'l Trade Comm'n 1984), *disapproved by presidential decree*, 225 U.S.P.Q. 862, *later proceeding, Duracell, Inc.* v. *United States Int'l Trade Comm'n*, 778 F.2d 1578 (Fed. Cir. 1985).

Parallel imports can involve a spectrum of corporate relationships—independent U.S. distributors having no relationship to the foreign manufacturer, *United States* v. *Eighty-Nine (89) Bottles of "Eau de Joy"*, 797 F.2d 767 (9th Cir. 1986); U.S. distributors to whom U.S. trademark rights were assigned by the foreign manufacturer with reassignment rights reserved, *Model Rectifier Corp.* v. *Takachiho Int'l, Inc.*, 220 U.S.P.Q. 508 (C.D. Cal. 1982), *aff'd*, 221 U.S.P.Q. 502 (9th Cir. 1983); a foreign manufacturer with a U.S. distributor subsidiary; a U.S. distributor and foreign manufacturer with a common parent; a U.S. distributor and foreign manufacturer with a licensing relationship, *Original Appalachian Artworks, Inc.* v. *Granada Electronics, Inc.*, No. 86-7670, slip op. (2d Cir. Apr. 7, 1987); *El Greco Leather Products Co.* v. *Shoe World, Inc.*, 806 F.2d 392 (2d Cir. 1986); a U.S. distributor and a foreign manufacturer where one has some stock interest in the other, although not a controlling one, *Bell & Howell: Mamiya Co.* v. *Masel Supply Co.*, 719 F.2d 42 (2d Cir. 1983). In some instances the United States trademark owner manufac-

tures goods in the United States, and the gray market product is that manufactured abroad, by its foreign subsidiary and intended for distribution abroad, *In re Certain Alkaline Batteries*, 225 U.S.P.Q. 823. To complicate matters further, in some cases the goods sold by the United States trademark owner and the parallel importer have been identical, *Parfums Stern, Inc.* v. *United States Customs Service*, 575 F. Supp. 416 (S.D. Fla. 1983); in others they have been identical, but with different warranties or services offered, *Weil Ceramics & Glass, Inc.* v. *Dash*, 618 F. Supp. 700; in still others the goods have been different, *Selchow & Righter Co.* v. *Goldex Corp.*, 612 F. Supp. 19 (S.D. Fla. 1985).

No pattern has emerged from these diverse cases. Many different factual backgrounds are involved and the issues are complex. They have been the subject of extensive study by the Working Group on Intellectual Property of the Cabinet Council on Commerce and Trade. Congressional hearings involving presentation of diverse views were held in connection with the Price Competitive Products Act introduced in 1986 by Senator Chafee. Various public and private organizations have studied the problem. Numerous articles have been written about it, including Nolan-Haley, *The Competitive Process and Gray Market Goods*, 5 N.Y.L. Sch. J. Int'l & Comp. L. 231 (1984); Note, *The Greying of American Trademarks: The Genuine Goods Exclusion Act and the Incongruity of Customs Regulation 19 C.F.R. § 133.21*, 54 Fordham L. Rev. 83 (1985); Lipner, *The Legality of Parallel Imports: Trademark, Antitrust, or Equity?*, 19 Texas Int'l L.J. 553 (1984).

USTA supports the decision of the Court of Appeals for the reasons set forth in Judge Silberman's opinion. It does not at this time take a position on whether, as a matter of policy, all parallel imports should or should not be excluded. As amicus, it does not address the question of jurisdiction, or submit arguments relating to principles of statutory interpretation. However, the numerous recent cases on parallel imports, whether brought under the Tariff Act or the Trademark Act, have involved either implicitly or explicitly basic and important

trademark issues, and USTA is participating as amicus curiae so that its views can be considered on those issues.

SUMMARY OF ARGUMENT

An interpretation of Section 526 of the Tariff Act which would bar parallel imports absent authorization of the United States trademark owner is consistent with the traditional concept that trademark rights are territorial and is further consistent with a principal purpose of the Federal Trademark Act, which is to secure to trademark owners the advantages of the reputation and goodwill they have created. Any departure from this concept should be by legislation rather than administrative interpretation.

An interpretation of Section 526 of the Tariff Act which would allow the importation of products, whatever their source, that are likely to deceive consumers as to the origin, characteristics, qualities or warranties of the imported goods is inconsistent with trademark law, in particular the concept that, to consumers, trademarks signify not only source but also product character and quality.

The claimed longevity of the Regulations in issue should not alone be determinative. The views of the Customs Service have themselves changed from time to time. And, the problem of parallel imports has resurfaced as a matter of consequence only in this decade, when factors in the international economy caused such imports to increase dramatically, generating the virtual flood of litigation that challenged the validity of the Regulations and ultimately resulted in the matter being reviewed by this Court.

ARGUMENT

I. Trademark Rights Are Territorial in Nature and Are Inseparable from the Goodwill They Represent

By its terms, the Tariff Act is absolute; parallel imports are barred unless the United States trademark owner has authorized importation, 19 U.S.C. § 1526. This acknowledgement of the absolute rights of a trademark owner is consistent with the principle that trademark rights are not universal, but are created and protected under the laws of individual countries. Those laws may differ. Rights in the United States, for example, are created by actual use of a trademark in commerce; in some other countries, rights are created by registration. As Judge Silberman observed, this concept of territoriality of rights was the basis for the decision of this Court in *A. Bourjois & Co.* v. *Katzel*, 260 U.S. 689 (1923). It is acknowledged in the Paris Convention for the Protection of Industrial Property, of which the United States is a signatory:

> A mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin. (Art. 6(3), 21 U.S.T. 1583, 1639, 24 U.S.T. 2140 (Presidential Proclamation of Oct. 13, 1973); T.I.A.S. Nos. 6923, 7727).

Substantial investments have been made and marketing policies based on this concept of national protection. It has been argued that the concept should take second place generally to a policy of encouraging free trade among nations and should not be considered when there is a relationship between the companies owning rights in this country and in other countries. The issues involved in striking a balance between these countervailing viewpoints are complex and significant.

It is also a basic concept that trademarks do not exist in a vacuum. They are not rights in gross, but exist only in connection with the trade in the goods on which they appear, and are thus inseparable from the goodwill they represent. *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*,

316 U.S. 203 (1942); Schechter, *The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813 (1927). Goodwill, in turn, consists of many intangibles, including the expectations created in consumers which allow them to make repurchase decisions based upon their past experience with the trademarked products.

The protection of this goodwill is a basic purpose of trademark legislation, as acknowledged in House of Representatives Report No. 219 accompanying H.R. 1654, Feb. 26, 1945:

> The purpose underlying any trade-mark statute is twofold. One is to protect the public so it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats. This is the well-established rule of law protecting both the public and the trademark owner.
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> * * *
>
> Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and goodwill by preventing their diversion from those who have created them to those who have not. This is the end to which this bill is directed.

Id. at 2, 3.

Petitioner K Mart has asserted that the cases before this Court involve companies that "sell identical trademarked products globally." Parallel importation, however, may arise in

various contexts. As previously pointed out, in some instances, identical products, manufactured abroad, are imported and sold here by the United States trademark owner and by the parallel importer. In other instances, goods manufactured in or for sale in the United States differ from those manufactured for sale abroad because of different local tastes, custom, or even local legal requirements. In other instances, even where the products are the same, the accompanying warranties and services supporting the product differ.

To the extent that parallel imports differ in quality or characteristics from goods sold in this country under the same trademark, allowing the unrestricted importation and sale of such goods does violence to the quality-identifying function of a trademark, and damages the goodwill represented by the trademark.

The more complex issue is whether an independent goodwill can exist and be protected against misappropriation (a second expressed aim of the Federal Trademark Act) if the product sold by the parallel importer is of the same quality as that sold by the United States trademark owner. Case law, including *Weil Ceramics & Glass, Inc.* v. *Dash*, 618 F. Supp. 700, has recognized and protected such independent goodwill. This issue, however, is the subject of fierce debate. Any tension between the aim of the trademark laws and the government's trade policies should not be resolved by administrative interpretation of a statute which, on its face, does not permit importation of such goods without consent of the United States trademark owner.

II. The Absence of a Challenge to the Customs Regulations Prior to 1982 Should Not Alone be Determinative

Although Customs' interpretation of Section 526 has been in place for many years, its longevity and freedom from attack may rest not on the fact that Customs' interpretation is correct, but on the fact that parallel imports have not resurfaced as a significant problem for United States trademark owners until recently, coinciding with the strength of the dollar

abroad. Thus, apart from *A. Bourjois & Co.* v. *Katzel*, 260 U.S. 689, and related cases brought in the 1920's, and the *Guerlain* case of 1957,[3] the numerous other cases brought under the Tariff Act, or under the Lanham Act, have been brought since 1982, when the problem became acute.

Nor has the position of the Customs Service been as consistent as urged by petitioners. Judge Winter, writing for the dissent in *Olympus Corp.* v. *United States*, noted that "the history of the regulation itself reflects the Customs Service's own confusion over the purpose and validity of the regulation. . . . The fact is that the Customs Service has over the years justified this regulation with arguments of opportunity tailored to whatever audience it happened to be addressing at the time," 792 F.2d at 322. Judge Nies in *Vivitar Corp.* v. *United States* likewise found that "[o]ur review . . . indicates that Customs has had and continues to have changing views *of the role of Customs* in enforcing § 1526(a) on behalf of owners of registered U.S. trademarks. . . ," 761 F.2d at 1565.

In February, 1983, the United States, through its then Assistant Attorney General William F. Baxter and Richard Abbey, Chief Counsel of the United States Customs Service, filed a Brief Amicus Curiae in the Court of Appeals for the Second Circuit in *Bell & Howell: Mamiya Co.* v. *Masel Supply Co.*, 719 F.2d 42. In that Brief, the Government advocated the position now taken by the respondents in the present case. It argued as follows:

1. "Neither the literal language of the Lanham Act, nor the policies underlying our trademark laws, support Masel's attempt to distinguish among holders of United States trademarks based on their relationship to the producer of the trademarked item."[4]
2. "Our experience, responsibility and interest . . . is related to the trademark and antitrust issues raised by

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3 *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958), *dismissed*, 172 F. Supp. 107 (S.D.N.Y. 1959).

4 In this case, Masel was the parallel importer, Mamiya Co. was the foreign manufacturer, and BHMC was the United States distributor.

this case which in our opinion should not turn on the nature of the relationship between Mamiya Co. and BHMC."

3. "But neither the legislative reports nor the congressional debate contain any clear evidence of a legislative intent to deny trademark protection where the owner of the U.S. mark is owned or controlled by the foreign manufacturer of the trademarked goods."
4. "Masel argues that because their products are genuine Mamiya cameras produced by the same manufacturer as BHMC's Mamiya products, there is no consumer confusion and thus no trademark infringement . . . . This argument ignores the Lanham Act's goal of protecting the goodwill and investment of the owner in a mark, and was rejected by the Supreme Court in *Bourjois* v. *Katzel*, 260 U.S. 689 (1923)."
5. "[W]hether the trademark owner is vertically related to the manufacturer is irrelevant as a matter of trademark law and policy. And, although the American trademark owner in *Bourjois* paid for good will already developed by the French manufacturer, here BHMC has paid for the good will of the "Mamiya" mark through its own investment in promoting the mark. Both types of investments are properly protected under the trademark laws."
6. "Indeed, the legislative history of the Lanham Act reflects a legislative determination that protection of investments in good will and product quality as well as preventing consumer deception were statutory goals."

We mention this history not to be critical of the Government's about-face but as a demonstration of the complexity of the issues involved. The history of views expressed by Customs and the various and diverse interpretations of the statute by the numerous courts that have recently addressed the issue dramatically emphasize that this is an issue that should not be resolved by administrative interpretation, particularly an interpretation at odds with the plain language of the statute being interpreted.

There are potentially conflicting business, consumer and public policy questions raised by the parallel imports problem. The stakes are very high. The issues are very complex. There is a statute that, on its face, appears to bar all parallel imports absent consent of the United States trademark owner.

CONCLUSION

It is USTA's position that this problem is too important and too complex to be resolved by Customs interpretation or by a court speculating on the intention of the draftsmen of the original Tariff Act or on the intentions of those who subsequently amended or failed to amend it. Whether parallel imports should or should not be allowed, and under what conditions, should be a matter for the legislature, and should involve an analysis of all legal, economic, and policy issues including those recognizing the importance of protecting trademarks and the goodwill they embody.

USTA therefore submits that the decision of the Court of Appeals should be affirmed, with the aim of having this problem resolved through the legislative process.

Respectfully submitted,

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Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of May, 1987, three copies of the within Brief Amicus Curiae of the United States Trademark Association were served by first class mail postpaid on each of the following: Charles Fried, Solicitor General, U.S. Department of Justice, Washington, D.C., 20530, attorneys for the federal Petitioners; Robert W. Steele, Steele, Simmons & Fornaciari, Suite 850, 2020 K Street, N.W., Washington, D.C. 20006-1857, attorneys for Petitioner K Mart Corporation; Nathan Lewin, Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Suite 500, Washington, D.C. 20037, attorneys for Petitioner 47th Street Photo, Inc.; and William H. Allen, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, attorneys for Respondents.

I further certify that all parties required to be served have been served.

Marie V. Driscoll